Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

YAGMAN & YAGMAN, P.C.,

Petitioner,

v.

DARYL F. GATES and
CITY OF LOS ANGELES,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the cost cutoff provisions of Rule 68, F.R. Civ. P. (West 1994), be applied to deny a plaintiff in a section 42 U.S.C. 1983 action fees pursuant to 42 U.S.C. 1988, when that plaintiff accepted a Rule 68, F.R. Civ. P., offer made conditioned upon joint acceptance by that plaintiff and another plaintiff, when the other plaintiff rejected the Rule 68 offer and thereby rendered acceptance by the first plaintiff a legal impossibility under general contract law but not under Rule 68?

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PETITION FOR WRIT OF CERTIORARI

Yagman & Yagman, P.C., a law firm, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* 1a-9a) is not yet reported, and was rendered on September 19, 1994, and the order of the district court (App. B, *infra,* 1b-3b), is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1994. F.R. App. P. (West 1994) Rule 36. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1954(1).

STATUTES AND RULES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, in pertinent part, provides:

> In any action or proceeding to enforce a provision of section [] . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 68, F.R. Civ. P. (West 1994), in pertinent part, provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment

finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . .

STATEMENT

In *Marek v. Chesny*, 473 U.S. 1 (1985), this Court made applicable to prevailing 42 U.S.C. 1983 plaintiffs the provisions of Rule 68, F.R. Civ. P. The Court interpreted the word "costs" in Rule 68 to be synonymous with the word "costs" in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The effect of *Marek* was to bar, as an item of recoverable costs under Section 1988, attorneys' fees potentially recoverable by a prevailing Section 1983 plaintiff to whom an offer under Rule 68 had been made, but who did not finally obtain a judgment more favorable than the offer, after the offer was not accepted by that plaintiff. The fees that could *not* be recovered would be fees ACCRUED AFTER THE NON-ACCEPTANCE OF THE OFFER.

Thus, Rule 68 came to have the effect of cutting off post-Rule 68-rejection, Section 1988 attorneys' fees, consistent with the accepted cost cutoff provisions of Rule 68.

The present action arises from the August 2, 1988, so-called Dalton Avenue Raid, during which 77 Los Angeles police officers executed a search warrant at four, duplex rental units in South Central Los Angeles. During the course of the Raid, scores of African Americans were arrested, the four rental units were trashed beyond habitability (to the extent that the American Red Cross stepped in to render disaster assistance and housing to

the residents), so that the word "Daltonize" in Los Angeles now is a commonly-used colloquialism synonymous with premises trashing by police. No drugs were recovered, nor was anyone (except four police officers who later were acquitted on state charges) charged with a crime.

Four separate lawsuits were filed as a result of the Raid: one by the occupants of the four rental units whose homes were trashed, and by bystanders who, along with the renters, all were arrested without probable cause; two by owners of the two duplexes, whose real property was rendered uninhabitable, useless, and virtually worthless by the physical destruction of the real property; and one by an elderly, adjacent home owner, whose window was broken out by a vacuum cleaner thrown from the second story window of a raided duplex by a raider. There were nearly 60 plaintiffs in the suits at the time they were consolidated.

Approximately 55 plaintiffs who were occupants and bystanders in the first suit settled their cases for three million five hundred thousand dollars (netting about fifty thousand dollars for the average plaintiff), plus attorneys' fees to be determined by the district court. One landowner settled for one hundred seventy-five thousand dollars, plus attorneys' fees, in the second suit. And, the elderly neighbor whose window was broken by the flying vacuum cleaner (and who was represented by the same counsel as the other two landowners plaintiffs, Petitioner herein), accepted a Rule 68 offer of fifty thousand dollars, but with no attorneys' fees.

There then remained in the case the two landowner plaintiffs, Henry Lang and Cheri Lang, who jointly were the owners of one duplex, consisting of two rental units.

After several Rule 68 offers were made to the Langs jointly, and conditioned upon acceptance of the offer by both Lang plaintiffs, Cheri Lang accepted a Rule 68 offer of six hundred thousand dollars plus costs, and Henry Lang rejected the offer. See Appendix C, at 1c. Defendants declared the acceptance to be "invalid." *Id.* at 2c. Cheri Lang accepted a second offer, and that offer was filed with the court along with her acceptance, pursuant to Rule 68. *Id.* at 4c-13c. It was the last offer and last acceptance.

The district court refused to enforce the attempted acceptance by Cheri Lang, who demanded payment of the Rule 68 amount offered. The district court ruled that it was impossible for Cheri Lang effectively to accept the Rule 68 offer because Henry Lang had rejected the offer.

Nine months after the last acceptance, and after the offer had expired by operation of law, Cheri Lang and Henry Lang settled for six hundred thousand dollars, plus attorneys' fees to be awarded by the district court.

Application was made to the court for fees pursuant to 42 U.S.C. 1988, and the court awarded fees, but refused to award any fees accrued after the date on which *Henry Lang* rejected the Rule 68 offer. Because, as part of the settlement the court ruled that the plaintiffs' lawyers were entitled to all fees to be awarded by the court, the proceeding below took on the new party of Yagman &

Yagman, P.C., Petitioner herein, as Real-Party-in-Interest-Appellant.

It was and is the plaintiffs'/petitioner's position that under no circumstances may a plaintiff who *accepts* a Rule 68 offer, and who otherwise is entitled to attorneys' fees under Section 1988, be denied an award of post-offer fees as part of an award of costs because: (1) the provisions of Rule 68 may not be read to warrant such a denial of fees in that circumstance; (2) a cutoff of fees as part of costs under Rule 68 is contemplated only when there later is a judgment, and not when there is a voluntary settlement that does not result in a judgment; (3) all plaintiffs who have viable claims in Section 1983 actions are entitled to be considered as individuals whose rights are not dependent upon the rights and/or actions of other plaintiffs; and (4) a plaintiff who accepts a Rule 68 offer of judgment made in a Section 1983 action – but whose acceptance is rendered impossible under general contract law by a factor beyond that plaintiff's control, *e.g.*, rejection of a joint offer by another plaintiff, may not be foreclosed from obtaining a post-offer fee award without a violation of the accepting plaintiff's right to due process of law, because that plaintiff would be deprived of the right to property in contravention of the very process established by the law, to wit, the provisions of Rule 68.

A fair reading of the express language of Rule 68, application of the law of contracts concerning offer and acceptance, and the very clear purposes underlying Section 1983, all render the opinion of the Court of Appeals erroneous.

REASONS FOR GRANTING THE PETITION

The reasons for granting the Petition are:

1. There has been a faulty construction of an important rule of federal procedure, Rule 68;

2. A faulty construction of a rule of procedure has the effect of nullifying a substantive federal statute, 42 U.S.C. 1988, whose provisions must take precedence over the subordinate rule of procedure; and,

3. The court below, on an issue of first impression at the federal appellate level, has decided that issue in a way that grossly mischaracterizes the applicable law and that is contrary to settled legal principles, and its erroneous decision likely will affect a large class of cases in the federal courts: civil rights cases.

I

THERE HAS BEEN A FAULTY CONSTRUCTION OF RULE 68, F.R. CIV. P.

The court below framed the issue before it thusly: "We must decide whether a plaintiff who first rejects a settlement offer [made pursuant to Rule 68, F.R. Civ. P.] may recover postoffer attorney's fees when he later accepts the same offer." *Lang v. Gates*, No. 93-55185 (9th Cir. September 19, 1994), slip op. at 11302.

As can be seen from the rest of the court's opinion, the party who applied for an award of fees, and who claimed post-Rule 68 offer fees, Cheri Lang, did *not* reject the rule 68 offer: she attempted in the only and best way

she could to accept that offer and manifested her acceptance of that offer.

Yet, the court below, first acknowledged that "Cheri Lang accepted the offer . . . ," *ibid.*, and then made the incredible statement of law that "[a]n offer not accepted on its terms is rejected." *Id.* at 11304. Thus, what the court below did was to acknowledge the fact of acceptance, but then fashion a new rule of law, not purported to be or supported by any cited authority, that in the circumstances of this case (and apparently, in general), any offer that is not accepted, or which may not be capable of acceptance, is, *ipso facto,* rejected. This rule is both wrong and wrong-headed.

Not only is that new rule of law unsupported, but in the circumstances of this case, and in light of the clear provisions of Rule 68, it is absurd. The court below attempts to support its incorrect analysis by stating that

> [i]n determining whether an offer is proper under Rule 68, courts will apply traditional principles of contract construction. [Citation omitted.] Conditional offers have long been recognized as valid under such principles. [Citation omitted.] ("The offeror is the master of his offer. . . . [He] is entitled to insist on a particular mode of manifestation of assent.")

Slip op. at 11303-04.

There is no question but that it is proper, in construing Rule 68, to apply traditional principles of contract construction. Also, there is no question but that it is appropriate for conditional offers to be made. What's more, it is true that an offeror is entitled to be the master

of his or her offer, and is entitled to insist upon a particular mode of acceptance. Yet, recognition and application of these long-recognized principles is not dispositive of the issue that was presented to the court below. That is so because the express provisions of Rule 68 defy application of the contract principles in the way the court below applied them.

Cheri Lang "serve[d] written notice that the offer [was] accepted, [and] then file[d] the offer and notice of acceptance . . . "[1] That action having been taken, by its express terms, which take precedence over any general principles of contract law, the remaining cost cutoff provisions of Rule 68 can have no application at all to this plaintiff.

Once plaintiff met the condition precedent of Rule 68 by manifesting acceptance of the offer in the only way permitted by Rule 68's express provisions, by its own terms, the "offer *not* accepted . . . [i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . " (emphasis added), provisions of Rule 68 could not come into play. Thus, having accepted the offer in the manner prescribed by Rule 68, plaintiff Cheri Lang could not be affected by the "must pay the costs" costs cutoff provision of Rule 68 because she accepted pursuant to Rule 68.

Rule 68 contemplates that acceptance be manifested in only one way, and provides that all other types of acts or omissions, other than acceptance in the prescribed

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[1] *See* Appendix C, *infra*.

way, constitute a rejection of a Rule 68 offer. Under the facts of this case, because plaintiff Cheri Lang accepted the Rule 68 offer pursuant to the terms of Rule 68, it was erroneous for the court below to state that "[a]n offer not accepted on its terms is rejected[,]" *id.* at 11304, and then to apply that general principle of law to conclude that Cheri Lang had rejected an offer which she had, in fact, accepted.

That Cheri Lang accepted the offer in a way consistent with Rule 68, but in a way in which the offer precluded her acceptance, does not warrant the conclusion that Cheri Lang rejected the offer. The only conclusion warranted is that the offer was impossible for Cheri Lang to accept in a way that would give rise to an enforceable agreement pursuant to general principles of contract law, but that it was nevertheless accepted in a way contemplated by the provisions of Rule 68.

If the general principles of contract law prevent the formation of a contract because, as the court below stated, "The offeror is the master of his offer [] [and] . . . is entitled to insist on a particular mode of manifestation of assent []," *id.* at 11304 then the result of that is *only* that – no enforceable contract was formed by an offer and an acceptance – and the result of that cannot be a superimposition on the provisions of Rule 68 that *its* provisions may be applied to render an acceptance a rejection[2] on the premise that, as the court below stated:

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[2] Only when one steps through the looking glass could an acceptance be a rejection. " 'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be, but as it isn't, it ain't. That's logic.' " Charles Ludwidge

"An offer not accepted on its terms is rejected." *Ibid.* That is, an acceptance under Rule 68 cannot be turned into a rejection under Rule 68 by application of principles of general contract law which are inappropriate to apply to the provisions of Rule 68 and to their interpretation.

Because Rule 68 contains its own explicit provision that determines precisely how a Rule 68 offer may be accepted, it was erroneous to read into Rule 68 the general contract principle that "[a]n offer not accepted on its terms is rejected." *Ibid.* In this instance, the provisions of Rule 68 make impossible the determination of whether *vel non* an offer under Rule 68 is accepted or rejected by reference to any source other than Rule 68, and make impossible the determination that a Rule 68 offer has been rejected by reference to the offer itself. Indeed, if the contrary were true, then a Rule 68 joint offer made to five plaintiffs represented by different counsel would operate to cut off costs to four plaintiffs who accepted the offer, if one plaintiff did not accept the offer. In this case, where there were nearly 60 plaintiffs in the four consolidated cases, the appeals court's reasoning would yield the absurd result that a non-acceptance of a Rule 68 offer by one, or five, or ten, or twenty of those plaintiffs would operate to cut off post offer costs to the other fifty-nine, or fifty-five, or fifty, or thirty plaintiffs, respectively. This would be absurd.

Rule 68 simply may not be read to permit superimposition on its terms of the principle of general contract law, that failure to accept a joint offer by one offeree

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Dodgson (Lewis Carroll), *Through the Looking Glass*, 1872, chapt. 4. An acceptance ain't a rejection, in law, in logic, under Rule 68, but only in Wonderland.

mandates that another, accepting offeree may be deemed to have rejected the offer. Such a conclusion defies the terms of Rule 68, logic, and common sense, and flies in the face of the common principle of law that the particular, here the provisions of Rule 68, controls the general, here the principles of general contract law. Under California law, this principle is set forth in California Civil Code (West 1994) Section 3534: "Particular expressions qualify those which are general."

(The court's concern about potential "collusion [that] has not been established in this case [but with] the curious pattern of vote-switching between the Langs []," slip op. at 11304, is no reason to twist the law as the court did, any more than it would be a ground to suspect mischief when the president, members of Congress, or members of this Court change their votes or positions on any issue. Each Lang plaintiff was free to take whatever position was taken at any time it was taken. The reasons they had for taking the positions they took with respect to the various Rule 68 offers were their's, were privileged and permissible, and they were positions which their counsel was obliged to have communicated in an appropriate fashion (as was done), counsel having determined that neither plaintiff had any improper or inappropriate purpose in taking any such position.)

Additionally, the court below interpreted the word "judgment" in Rule 68 to include the word "settlement." This, too, was erroneous.

It must be presumed that the drafters of Rule 68 understood the difference between the words "judgment" and "settlement." The two words have very different

meanings and very different consequences. Also, it must be presumed that if the drafters of Rule 68 wanted to include the settlement of an action as a condition that would trigger application of the cost cutoff provisions of Rule 68, then they would have used that word, in addition to the word "judgment" in the Rule, or that they would have used some general, or non-specific word that would have included the concepts of both a judgment and of a settlement. Such words that could have been, but were not, used in Rule 68's cost cutoff clauses are: "resolution," "result," "amount gotten," "money gotten," or "benefit." None of these words was used, and it must be presumed that any one of them, or other such words of similar import, would have been used had the drafters of Rule 68 intended the sort of result the court below has invented. All district courts but one who have decided the issue whether or not a settlement triggers the provisions of Rule 68 in the same way a judgment triggers its provisions, have concluded that "settlement" does not mean "judgment." *See Good Timez v. Phoenix Fire and Marine Ins. Co.*, 754 F. Supp. 459, 462-63 (D. Virgin Islands 1991); *Hutchison v. Wells*, 719 F. Supp. 1435, 1443 (S.D. Ind. 1989); *EEOC v. Hamilton Standard Div.*, 637 F. Supp. 1155, 1158 (D. Conn. 1986). But *see, Boorstein v. City of New York*, 107 F.R.D. 31, 33 (S.D.N.Y. 1985).

In civil rights actions, there is an especially sound reason not to read the word "settlement" into the word "judgment" in Rule 68. It cannot be gainsaid that deterrence is one of the primary purposes of civil rights actions. *See, e.g. Hardin v. Straub*, 109 S.Ct. 1998, 2001 (1989) ("§ 1983's chief goals [are] compensation and deterrence. . . . "); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981)

(plurality) ("Section 1983 is not solely a compensatory statute, it is also a deterrent statute.") Settlements achieve little deterrence in civil rights actions. No obloquy attends them, and they produce no ostracism of the offending defendants. On the other hand, judgments often produce obloquy, stigma, and ostracism, and thereby achieve the function of civil rights actions – deterrence – that is not produced by settlements. Judgments are a charge against the name of the offending party, and may be recorded as such. Settlements receive little notice, and experience demonstrates that they have little or no deterrent effect. Thus, to read into the word "judgment," which has some sting and hence some deterrent effect, the word "settlement" in a civil rights action is inconsistent with the purposes of Section 1983 as often expounded by this Court. Including "settlement" in "judgment" as the court below did has no support in any law, and, indeed no such law is cited by the court below, and its invention runs directly contrary to the purposes of Section 1983.

The court below states that "[t]o preserve and to promote the purposes of Rule 68, the phrase 'judgment finally obtained' certainly would encompass an order finally terminating the litigation as a result of settlement." Slip op. at 11307. Yet, the word "certainly" is a tip-off that there is no authority to support this precatory proposition. "Certainly" is no substitute for case law authority or for proper statutory construction.

Probably, the correct manner in which to characterize the acceptance/rejection phenomenon in this case is the way in which it was characterized in *Corder v. Gates*, 688

F. Supp. 1418, 1420 (C.D. Cal. 1988) (amended memorandum of decision and order by now-Ninth Circuit Judge Pamela Ann Rymer, in a case in which Petitioner herein was counsel for plaintiffs), a case which the court below blew off as being a case in which the court "expressly declined to decide [the issue]." Slip op. at 11303. What the court did decide in *Corder* was that a plaintiff to whom a joint Rule 68 offer had been made, and who accepted that offer while the other plaintiff to whom the offer had been made rejected the offer, was legally incapacitated from accepting the offer. 688 F. Supp. at 1420. That conclusion is both logically sound and legally correct. Yet, the analysis in *Corder* should have been dispositive of the issue before the court below in this case.

In *Corder*, the court held that "[b]ecause of the partial rejection [of the Rule 68 offer by one of the two plaintiffs], [defendants] contend that their offer was terminated. . . . Acceptance by one of the plaintiffs, accompanied by the rejection by the other, cannot constitute a valid acceptance of defendants' offer." *Ibid.* The correct analysis here of the offer and attempted acceptance is that the rejection of the offer by one plaintiff operated to terminate the offer so that there no longer existed any offer for plaintiff Cheri Lang to accept. There being no offer capable of acceptance once the rejection was made entails the result that the cost cutoff provisions of Rule 68 may not come into play. Rather than simply dismissing *Corder* as irrelevant, the brother judges of now-Ninth Circuit Judge Rymer should have followed her analysis to decide that plaintiff Cheri Lang simply could not accept a terminated offer, and that the of that phenomenon was only that

plaintiff Cheri Lang's post-Rule 68 offer attorneys' fees, as part of costs under Section 1988, could not be cut off.

If it is necessary to promote the purposes of Rule 68 for the Ninth Circuit to rewrite it, then that paradox simply is something that court may not do. Only the proper rule-making body may do that.

And, if it necessary to promote the purposes of Rule 68 to give it precedence over and to make it superior to the clear provisions of Section 1983 and its oft-stated purpose, then the provisions and construction of Section 1983 – a statute, must take precedence over Rule 68, a mere rule of procedure.

Rule 68 is a procedural mechanism that governs the conduct of litigation, while Section 1983 is an important substantive, remedial statute that gives life and meaning to the Constitution. In an instance in which there is a conflict between an important substantive statute and a rule of procedure, then the rule of procedure, which can impart no substantive rights, must give way to the statute, or must be interpreted in a manner consistent with the statute's purposes. As this Court recognized in *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1978), a statute that does not provide for any substantive rights (such as Rule 68), may not take precedence over a statute that does contain substantive rights (such as Sections 1983 and 1988 of Title 42, U.S.C.). *A fortiorari*, a statute that does provide for substantive rights, must take precedence over a statute that does not provide for any substantive rights. Here, of course, the only conflict between the rule and the statute is the one invented by the court below.

Plaintiff Cheri Lang is entitled to the benefit of due process of law as an individual, and independent of plaintiff Henry Lang.[3] This is so notwithstanding any procedural rule to the contrary, because a mere procedural rule may not be interpreted, as here, in a way that would strip plaintiff Cheri Lang of her right to individual due process of law. Plaintiff Cheri Lang's right to due process in the federal courts, as an individual, is contained in the so-called "rights of persons" clause of the Fifth Amendment to the United States Constitution.

That right is set forth as the principle that "[n]o person . . . shall be . . . deprived of life, liberty, or property, without due process of law. . . . " Plaintiff Cheri Lang as an individual person had the right to property, including her right to sue in this action under Section 1983 and her right to attorneys' fees under Section 1988 – both substantive rights, under the Fifth Amendment. By construing plaintiff Cheri Lang's right to property as dependent upon plaintiff Henry Lang's rights, the court below imposed an unsupportable burden on Cheri Lang's individual, indivisible rights.

There is no support for the court's diminution of Cheri Lang's rights, and because that diminution of her rights violated her right to due process under the Fifth Amendment, the court's decision is wrong. No reading or interpretation of the provisions of either Rule 68 or of the general principles of contracts can stand if it runs afoul of the due process provisions of the Fifth Amendment, and

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[3] Defendants hotly contested that there was any legal relationship between Cheri Lang and Henry Lang, and that issue was not finally or dispositively decided below.

that is precisely what the court of appeals decision does in this case.

Because Rule 68 has been incorrectly interpreted in a way wholly inconsistent with its clear language, by making an acceptance a rejection and by making a judgment a settlement, the court of appeals judgment must be reversed.

Because a rule of procedure has been given precedence over a statute, the court of appeals judgment must be reversed.

Because the court of appeals grossly mischaracterized the applicable law in a way contrary to explicit legal principles, and because that mischaracterization is likely to have an adverse effect on a large class of federal cases, the court of appeals judgment should be reversed.

Because the court of appeals decision impermissibly diminishes plaintiff Cheri Lang's due process rights, its judgment must be reversed.

II

CONCLUSION

For the reasons set forth herein, this Court either should grant certiorari or should summarily reverse the judgment of the court of appeals in order to cause a proper construction and interpretation of the provisions of Rule 68, F.R. Civ. P.

The Petition for Certiorari should be granted.

Respectfully submitted,

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*Yagman & Yagman, P.C. was the fee applicant, and hence is the Petitioner.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERI LANG; HENRY LANG; LILLIAN D'ANTIGNAC, *Plaintiffs,* & YAGMAN & YAGMAN, P.C., *Real-Party-in-Interest-Appellant,* v. DARYL F. GATES, Chief of Police; REVA TOOLEY; ROBERT TALCOTT; HERBERT F. BOECKMANN, II, *Defendants-Appellees.*	No. 93-55185 D.C. No. CV-89-04229-RMT OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
August 1, 1994 – Pasadena, California

Filed September 19, 1994

Before: Diarmuid F. O'Scannlain and Thomas G. Nelson, Circuit Judges; Robert R. Merhige, Jr.,* District Judge.

Opinion by Judge O'Scannlain

*The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the real-party-in-interest-appellant.

Lisa S. Berger, Deputy City Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a plaintiff who first rejects a settlement offer may recover postoffer attorney's fees when he later accepts the same offer.

I

In August 1988, Los Angeles police conducted a raid of Cheri and Henry Lang's South Central Los Angeles home. In response, the Langs filed suit against Los Angeles Police Chief Daryl Gates, the City of Los Angeles, and various individual Los Angeles police officers, city officials, and government employees under 42 U.S.C. § 1983.

Prior to trial, defendants made an offer of settlement for $600,000 plus reasonable attorney's fees and costs incurred, pursuant to Federal Rule of Civil Procedure 68. The offer stated that "[a]cceptance by less than both Plaintiffs shall be deemed a rejection of this offer." Cheri Lang accepted the offer and Henry Lang rejected it.

Over nine months later, the district court approved a settlement between the parties in the amount of $600,000 plus attorney's fees to be determined at a later date. As

part of the settlement the Langs dismissed the action with prejudice.

The Langs' attorney, Stephen Yagman ("Yagman"), then filed a motion for attorney's fees in the amount of $1,288,275. Reducing Yagman's billable hours and hourly rate, the district court awarded him $247,368 in fees. Specifically, the district court also held that Yagman was "not entitled to recover attorney's fees incurred after defendants' Rule 68 offer." Yagman appeals this latter ruling.

II

Rule 68 provides that, if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The principal purpose of the Rule is to encourage settlement and to avoid litigation. Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F.R.D. 433 (1946); *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991). This case requires us to decide whether defendants' offer qualifies under Rule 68, and whether Rule 68 applies to cases terminated pursuant to settlement.

A

Yagman contends that defense offers conditioned upon the acceptance of multiple plaintiffs are invalid under Rule 68. Such offers, he argues, are impossible for individual plaintiffs to accept and thus constitute a legal nullity. Consequently, he concludes, Rule 68 does not apply where one plaintiff attempted to accept such a conditional offer, but was unable to do so because the other plaintiff rejected it.

The question seems to be one of first impression in this circuit, and indeed, in the country. *See Corder v. Gates*, 688 F. Supp. 1418 (C.D. Cal. 1988), *aff'd in part, rev'd in part*, 947 F.2d 374 (9th Cir. 1991). Yagman offers no authority except *Corder* which expressly declined to decide it. *Id.* at 1421 n.3. We must reject his argument.

In determining whether an offer is proper under Rule 68, courts will apply traditional principles of contract construction. *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). Conditional offers have long been recognized as valid under such principles. Restatement (Second) of Contracts, § 29 cmt. a ("The offeror is the master of his offer. . . . [He] is entitled to insist on a particular mode of manifestation of assent."). We see no reason to depart from these principles here.

Moreover, we are concerned that to require that plaintiffs be allowed to accept or to reject joint offers individually "might encourage multiple plaintiffs to hedge their bets by collusively having at least one party accept the offer and at least one other decline. That way they could both benefit if the judgment is greater than the offer, and could both avoid incurring costs and loosing

[sic] attorney's fees if it is less." *Corder*, 688 F. Supp. at 1421 n.3. Because joint offers will most often be made where plaintiffs have a common interest, the risk of collusion is great.

While collusion has not been established in this case, we are concerned by the curious pattern of vote-switching between the Langs. The defendants made several Rule 68 offers before the Langs ultimately settled. Henry Lang accepted defendants' first offer, while Cheri Lang adamantly rejected it.[1] After the city attorney challenged Henry Lang's standing to bring suit, however, Cheri Lang accepted all subsequent Rule 68 offers, and Henry Lang rejected them. Given these facts, it would not be unreasonable to conclude that plaintiffs were attempting to do exactly what the district court in *Corder* feared – positioning each other to avoid the potential consequences of rejecting a Rule 68 offer.

An offer not accepted on its terms is rejected. We see no reason why a defense offer conditioned upon joint acceptance by both plaintiffs should not qualify for Rule 68 treatment.

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[1] Cheri Lang's rejection read: "Cheri Lang hereby rejects defendants' Rule 68 offer because it is imperative that the police defendants in this action who acted like totalitarians and their supervisors, who made that conduct possible, and who continue to condone that conduct, be brought to justice before a jury and in public so that there will be some small chance that these malefactors will not engage in this sort of outrageous conduct again. These people must be deterred, and a settlement will have no deterrent value."

B

The second question is whether the term "judgment" as used in Rule 68 includes the termination of litigation pursuant to settlement. As noted, Rule 68 prevents a plaintiff who has rejected a Rule 68 offer from recovering attorney's fees "where the *judgment* finally obtained . . . is not more favorable than the offer." Fed. R. Civ. P. 68 (emphasis added). Yagman contends that this portion of the Rule applies only to those cases concluded by trial on the merits, and has no bearing on cases resolved by subsequent settlement. We reject this contention.

First of all, settlement in this case resulted in an order of dismissal with prejudice which, if not in form a judgment for defendants, is certainly one in substance. Further, the primary purpose of Rule 68 is to encourage settlements, and it should be construed with this objective in mind. *Marek v. Chesny*, 473 U.S. 1, 5 (1985). Implicit in this purpose is the desire to deter a plaintiff's attorney from rejecting reasonable settlement offers and instead pursuing extended negotiations and litigation, in the hope of accumulating fees. *Marek*, 473 U.S. at 11.

The application of Rule 68 to cases resolved by subsequent settlement fulfills these ends by encouraging plaintiffs, defendants, and their attorneys to settle. From a plaintiff's perspective, such an application of Rule 68 means that plaintiffs who fail to accept an initial reasonable offer will not recoup attorney's fees if the case is settled by a later offer of lesser or equivalent value. This result "will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile [and] that is

precisely what Rule 68 contemplates."[2] *Marek*, 473 U.S. at 10. In contrast, the narrow reading that Yagman proposes will frustrate the objectives of Rule 68. A plaintiff who is free to accept successive settlement offers has little incentive to consider carefully an initial offer, despite that offer's reasonableness.

To adopt Yagman's suggested interpretation of Rule 68 would similarly discourage defendants from settling. Defendants whose initial fair offer has been rejected will not make the same offer again if to do so would render them liable for plaintiff's attorney's fees. Rather, such defendants would take their chances at trial, in the hope of obtaining an equal or lesser judgment and thereby avoiding fees. But by interpreting the term "judgment" broadly to encompass termination of litigation resolved by subsequent settlement, defendants would be encouraged to renew their initial offer as the case proceeds to trial, without fear of liability for attorney's fees accrued during the interim.

Finally, and perhaps most seriously, Yagman's reading of the Rule would allow a plaintiff's counsel to encourage rejection of a Rule 68 offer, prolong settlement negotiations while accumulating fees, and then have the client accept the same offer – or one of lesser value – at a

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[2] Note, however, that our reading of Rule 68 does not force a plaintiff to accept *any* initial offer made by the defendant. Rather, plaintiffs are encouraged only to accept those offers where the likelihood of obtaining more at a later date is low. If the defendant's offer is unreasonable, and the plaintiff is relatively certain that he can obtain a larger recovery through continued negotiation or after trial, he wisely will reject such an offer.

later date, earning significantly more in attorney's fees through the delay, although plaintiff himself would gain nothing. Such a result would contradict the intent of Rule 68 to facilitate settlement and to ensure that plaintiff has received "monetary benefits from the postoffer services of his attorney." *Marek*, 473 U.S. at 11. By contrast, applying Rule 68 to cases resolved by settlement will serve as a disincentive for plaintiff's attorney to recommend continued litigation needlessly after defendant has made a reasonable settlement offer.

Unlike our holding today, several district courts have concluded that Rule 68 does not apply in those cases terminated by settlement. *Good Timez v. Phoenix Fire and Marine Ins. Co.*, 754 F. Supp. 459, 462-63 (D. Virgin Islands 1991); *Hutchison v. Wells*, 719 F. Supp. 1435, 1443 (S.D. Ind. 1989); *EEOC v. Hamilton Standard Div.*, 637 F. Supp. 1155, 1158 (D. Conn. 1986).[3] In reaching such conclusion, the district courts reasoned that if plaintiffs were prevented from recouping attorney's fees following subsequent settlement, "it would provide a disincentive for attorneys to accept settlements once an initial settlement was rejected." *Hutchison*, 719 F. Supp. at 1443. Such reasoning is incomplete, however. The application of Rule 68 to cases like the one before us provides a disincentive for attorneys to recommend accepting *lesser or equivalent* settlements once an initial settlement has been rejected. Yet

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[3] At least one district court has suggested that Rule 68 does apply to settlements. *Boorstein v. City of New York*, 107 F.R.D. 31, 33 (S.D.N.Y. 1985) ("If the judgment *or settlement* ultimately obtained by plaintiff is less than the Rule 68 offer, plaintiff cannot recover attorneys' fees or costs from the date the offer was made to the end of the suit.") (emphasis added).

this is exactly as it should be. Rule 68 seeks not to encourage plaintiffs to accept equal or lesser offers at a later date, but rather is intended to encourage plaintiffs to consider carefully and seriously a reasonable offer when made. To discourage parties from doing so does not benefit plaintiffs; indeed, such delay benefits only a plaintiff's attorney.

To preserve and to promote the purposes of Rule 68, the phrase "judgment finally obtained" certainly would encompass an order finally terminating the litigation as a result of settlement.

III

Postoffer attorney's fees were properly denied in this case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHERI LANG, et al., Plaintiffs, vs. DARYL GATES, et al., Defendants.	No. CV 89-4229-RMT(JRx) ORDER GRANTING MOTION BY YAGMAN & YAGMAN, P.C. FOR AWARD OF ATTORNEY'S FEES AND REQUIRING FILING OF FEE SCHEDULES FOR FEES INCURRED ON FEE MOTION (Filed Dec. 22, 1992)

This matter having come before court on the motion by Yagman & Yagman, P.C. for award of attorney's fees, and the court having considered the pleadings and other documents filed herein and having determined that:

1. The settlement agreement between the parties herein provided for an award of attorney's fees;

2. Yagman & Yagman, P.C. is not entitled to recover attorney's fees incurred after defendants' Rule 68 offer. *See* Federal Rules of Civil Procedure, Rule 68; *Erdman v. Cochise County, Ariz.*, 926 F.2d 877 (9th Cir. 1991); *Boorstein v. City of New York*, 107 F.R.D. 31 (D.C.N.Y. 1985);

3. Yagman & Yagman, P.C. are entitled to recover for the 97.5 hours of attorney time spent re-deposing witnesses in 1990, since the court previously awarded Yagman & Yagman, P.C. attorney's fees for those hours;

4. The hours for which recovery is sought should be reduced in light of counsel's insufficient descriptions of time expended and deficient bookkeeping; additionally, counsel should not recover fees for time expended on claims not resolved in plaintiff's favor;

5. The reasonable hourly rate for Stephen Yagman is $300 per hour for services performed in 1989 and 1990 and $325 per hour for services performed in 1991;

6. The reasonable hourly rate for Marion Yagman is $225 per hour for services performed in 1989 and 1990 and $250 per hour for services performed in 1991;

7. Yagman & Yagman, P.C. should recover attorney's fees for Stephen Yagman's services for 444.00 hours in 1989 and 1990, and 238.50 hours in 1991. Yagman & Yagman, P.C. should recover attorney's fees for Marion Yagman's services for 146.25 hours in 1989 and 1990, and 15.00 hours in 1991; and

8. Counsel are not entitled to a multiplier. *City of Burlington v. Dague, et al.*, ___ U.S. ___, 112 S.Ct. 2638 (1992),

IT IS ORDERED that:

1. The motion by Yagman & Yagman, P.C. for award of attorney's fees is granted.

2. Yagman & Yagman, P.C. are awarded attorney's fees in the sum of $247,368.75.

3. This award of attorney's fees is conditioned upon a waiver by Yagman & Yagman, P.C. of its rights to payment under any fee agreement relating to the instant action.

4. It appearing from the record that although Yagman & Yagman, P.C. may have served its fee schedules for attorney's fees incurred on fee motion, it failed to file same with the court. Accordingly, this award of attorney's fees does not include an award for services rendered in preparing the motion for attorney's fees. Yagman & Yagman, P.C. shall file said document on or before January 8, 1993. The court has defendant's opposition thereto. On or about January 16, 1993, the court shall [sic] its ruling with respect to the request for attorney's fees incurred in preparation of motion for attorney's fees.

Dated: DEC 22, 1992

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX C

YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(213) 452-3200

Attorneys for Plaintiff(s)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHERI LANG, et al., Plaintiffs, v. DARYL GATES, et al., Defendants.	No. Civ.-89-4229-RMT(JRx) NOTICE OF ACCEPTANCE AND OF REJECTION OF RULE 68 OFFER

Plaintiffs Cheri Lang and Henry Lang hereby accept and reject all defendants' Rule 68 offer that judgment be entered, respectively, as follows:

Cheri Lang accepts said offer, and requests that judgment be entered against all defendants in his favor in the sum of $600,000, as offered. Henry Lang rejects the offer.

YAGMAN & YAGMAN, P.C.

By _____
STEPHEN YAGMAN

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Senior Assistant City Attorney
PHILIP J. SUGAR, Assistant City Attorney
S. DAVID HOTCHKISS, Deputy City Attorney
100 North Main Street
1800 City Hall East
Los Angeles, California 90012
(213) 485-5431

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHERI LANG and HENRY LANG, Plaintiffs, vs. **DARYL F. GATES, et al.,** Defendants.	**CASE NO. CV 89-4229 RMT(JRx)** NOTICE OF INVALIDITY OF PURPORTED ACCEPTANCE OF RULE 68 OFFER

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the purported notice of acceptance of F.R.C.P., Rule 68 offer in the above-entitled matter filed on or about March 15, 1991 is invalid due to the fact that it has not been accepted by both Plaintiff Henry Lang and Plaintiff Cheri Lang. As set forth in the offer of judgment, a copy of which is attached herewith, the defendants' offer of judgment pursuant to F.R.C.P., Rule 68 "is contingent upon acceptance by both above-named Plaintiffs, Cheri Lang and Henry Lang, and is not

divisible. *Acceptance by less than both Plaintiffs shall be deemed a rejection of this offer."* Accordingly, defendants' F.R.C.P., Rule 68 offer has been rejected in its entirety and is of no further force or effect.

DATED: March 22, 1991

Respectfully submitted,

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON,
Senior Assistant City Attorney
PHILIP J. SUGAR,
Assistant City Attorney
S. DAVID HOTCHKISS,
Deputy City Attorney

By /s/ S. David Hotchkiss
S. DAVID HOTCHKISS
Deputy City Attorney

Attorneys for Defendants.

YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(213) 452-3200

Attorneys for Plaintiff(s)

COPY TO BE DATE-STAMPED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHERI LANG, et al., Plaintiffs, v. DARYL GATES, et al., Defendants.	No. Civ. - 89-4229-RMT(JRx) 89-4510-RMT(JRx) (consolidated) NOTICE OF ACCEPTANCE AND OF REJECTION OF RULE 68 OFFER

Plaintiffs Cheri Lang and Henry Lang hereby accept and reject defendants' Rule 68 offer served on April 15, 1991, respectively, as follows:

Cheri Lang accepts said offer, and requests that judgment be entered in her favor against all defendants. Henry Lang rejects said offer on the ground that the offer is imprecise as to what amount would be paid to him and is not for a sum certain because he is unable to ascertain what the term "plus reasonable attorneys' fees and costs" means in concrete terms – that is how much money in

attorneys' fees and costs will he receive were he to settle, and how would such amounts be calculated.

YAGMAN & YAGMAN, P.C.

By _____
STEPHEN YAGMEN

Peter J. Ferguson, Esq.
Ferguson, Praet & Sherman
333 South Anita, Suite 630
Orange, CA 92668
(714) 978-9972

Attorneys for Defendant Todd B. Parrick

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHERI LANG and HENRY LANG, Plaintiffs, vs. **DARYL F. GATES, ROBERT TALCOTT, HERBERT BOECKMANN, REVA TOOLEY, SAMUEL WILLIAMS, STEPHEN YSLAS, ROBERT VERNON, TOM BRADLEY, MARVIN BRAUDE, HAL BERNSON, ROBERT FARRELL, JOHN FERRARO, JOAN MILKE FLORES, RUTH GALANTER, GLORIA MOLINA, JOY PICUS, JOEL WACHS, ZEV YAROSLAVSKY, TOM ELFMONT, DENNIS ALEMAN, LEE ALLEN, ARTHUR ALVAREZ, JOSEPH ANZALLO, RANDALL ARAKAWA, RONALD BAIR, NICHOLAS BAKAY, JEFFREY BERTRAND, LISA BJAZEVICH, MATTHEW BLAKE, LIMMIE BLAYLOCK, SHARON BORUNDA, REGINALD BRAGGS, JOHN BYER, JOHN**	CASE NO. CV 89-4229 RMT(JRx) OFFER OF JUDGMENT PURSUANT TO FRCP, Rule 68

CARAVEO, CHRISTOPHER)
CARNAHAN, LARRY CLARK,)
ROBERT CLARK, JEFFREY)
CLAUSEN, TODD CLEASE,)
GARRY COUSO, JAMES)
CRAWFORD, JONATHAN)
CRENSHAW, JOSEPH DE)
LORENZO, RICHARD DE)
MARTINO, DAVID DOLAN,)
HECTOR FELICIANO, ALFONSO)
FIGUEROA, SILVIO FILIPOVICH,)
RAYMOND FOSTER, DEREK)
GONSALVES, FRANK GUZMAN,)
CHARLES HALLIBURTON,)
THEODORE HAMMOND, JAMES)
HART, ENRIQUE HERNANDEZ,)
ROBERT HERNANDEZ, DONALD)
HUDSON, CARLOS ISLAS,)
KEITH JACKSON, KEVIN)
JACKSON, MICHAEL JACKSON,)
RAYMOND JATKOWSKI, DAVID)
JONES, DANLONG DEYSER,)
MARK LA BONTA, STEVE LA)
ROCHE, MAURICE LANDRUM,)
CARLTON LAWRENCE, STEVEN)
LEMMER, GARY LEVY, MARTIN)
MARTINEZ, JULIE Mc ALPINE,)
TIMOTHY Mc RATH, RICHARD)
MELENDEZ, FRANCIS)
MENDOZA, ADAM MILECKI,)
MICHAEL MISKOWIEC, LAURO)
MONTES, EDWARD ORNELAS,)
TODD PARRICK, DONALD)
PAYNE, JEFFREY PEREZ, KHANH)
PHAN, MICHAEL RANGEL, TY)
RICHMOND, JEFFREY)
)

SANDEFUR, CARL SIMS, RICHARD SMITH, CHARLES SPICER, STEVEN STEIN, JAMES TATREAU, MARK TICO, DIANE TOSTADO, LARRY WALKER, GREG WELLS, CHARLES WILSON, FERNANDO ZUNIGA, JEFFREY MUNDT, HEIDI GALLEGOS, WILLIAM RATHBURN, all sued in both their individual and official capacities, NINETY SEVEN OTHER EMPLOYEES OF CITY OF LOS ANGELES, in both capacities, and CITY OF LOS ANGELES,	)
Defendants.	)

TO: PLAINTIFFS, CHERI LANG AND HENRY LANG, AND THEIR ATTORNEYS OF RECORD:

FROM: ALL DEFENDANTS INCLUDING DARYL GATES, ROBERT TALCOTT, HERBERT BOECKMANN, REVA TOOLEY, SAMUEL WILLIAMS, STEPHEN YSLAS, ROBERT VERNON, TOM BRADLEY, MARVIN BRAUDE, HAL BERNSON, ROBERT FARRELL, JOHN FERRARO, JOAN MILKE FLORES, RUTH GALANTER, GLORIA MOLINA, JOY PICUS, JOEL WACHS, ZEV YAROSLAVSKY, TOM ELFMONT, DENNIS ALEMAN, LEE ALLEN, ARTHUR ALVAREZ, JOSEPH ANZALLO, RANDALL ARAKAWA, RONALD BAIR, NICHOLAS BAKAY, JEFRFREY BERTRAND, LISA KJAZEVICH, MATTHEW BLAKE, LIMMIE BLAYLOCK, SHARON BORUNDA, REGINALD BRAGGS, JOHN BYER, JOHN CARAVEO,

CHRISTOPHER CARNAHAN, LARRY CLARK, ROBERT CLARK, JEFFREY CLAUSEN, TODD CLEASE, GARRY COUSO, JAMES CRAWFORD, JONATHAN CRENSHAW, JOSEPH DE LORENZO, RICHARD DE MARTINO, DAVID DOLAN, HECTOR FELICIANO, ALFONSO FIGUEROA, SILVIO FILIPOVICH, RAYMOND FOSTER, DEREK GONSALVES, FRANK GUZMAN, CHARLES HALLIBURTON, THEODORE HAMMOND, JAMES HART, ENRIQUE HERNANDEZ, ROBERT HERNANDEZ, DONALD HUDSON, CARLOS ISLAS, KEITH JACKSON, KEVIN JACKSON, MICHAEL JACKSON, RAYMOND JATKOWSKI, DAVID JONES, DANLONG KEYSER, MARK LA BONTA, STEVE LA ROCHE, MAURICE LANDRUM, CARLTON LAWRENCE, STEVEN LEMMER, GARY LEVY, MARTIN MARTINEZ, JULIE MC ALPINE, TIMOTHY MC RATH, RICHARD MELENDEZ, FRANCIS MENDOZA, ADAM MILECKI, MICHAEL MISKOWIEC, LAURO MONTES, EDWARD ORNELAS, TODD PARRICK, DONALD PAYNE, JEFFREY PEREZ, KHANH PHAN, MICHAEL RANGEL, TY RICHMOND, JEFFREY SANDEFUR, CARL SIMS, RICHARD SMITH, CHARLES SPICER, STEVEN STEIN, JAMES TATREAU, MARK TICO, DIANE TOSTADO, LARRY WALKER, GREG WELLS, CHARLES WILSON, FERNANDO ZUNIGA, WILLIAM RATHBURN, and NINETY SEVEN UNKNOWN NAMED LAPD OFFICERS, all sued in both their official and individual capacities; CITY OF LOS ANGELES, CONNIE CASTRUITA, SERGIO DIAZ, HEIDI GALLEGOS, JOSEPH GERMAIN, CHARLES KUNZ, JEFF MUNDT, STEPHEN MURPHY, FRANK VALDEZ, CLYDE VLASKAMP, WILLIAM WARD, and MICHAEL WILLIAMS.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, all Defendants collectively hereby offer to both above named Plaintiffs collectively to allow judgment to be taken against them in these actions. Defendants offer Plaintiffs Cheri Lang and Henry Lang the collective amount of $600,000.00 plus reasonable attorneys' fees and costs incurred to date. This offer of judgment is made in good faith and for the purposes specified in Rule 68, and it is not to be construed either as an admission that the Defendants are liable in these actions, or that the Plaintiffs have suffered any damages. This offer is contingent upon acceptance by both above named Plaintiffs, Cheri Lang and Henry Lang, and is not divisible. *Acceptance by less than both Plaintiffs shall be deemed a rejection of this offer.*

This offer is made with the express authority of all Defendants to both above named Plaintiffs and their attorneys. Acceptance of this offer shall result in dismissal of all claims by both Plaintiffs and all Defendants entitled above.

JAMES K. HAHN,
City Attorney
THOMAS C. HOKINSON,
Senior Assistant
City Attorney
PHILIP J. SUGAR,
Assistant City Attorney

DATED: 3-21-91

By: /s/ Philip J. Sugar
Philip J. Sugar,
Assistant
City Attorney,
Attorneys for
Defendants City
of Los Angeles
and all individual
Defendants not
represented by
private counsel

DATED: 3/7/91

FERGUSON, PRAET &
SHERMAN

By: /s/ Peter J. Ferguson
Peter J. Ferguson,
Attorneys for
Defendant Todd
B. Parrick

DATED: MAR. 6, 1991

BURKE, WILLIAMS &
SORENSEN

By: /s/ Thomas J. Feeley,
Thomas J. Feeley,
Attorneys for
Defendant
Charles E. Spicer

DATED: 3-22-91

MORRIS, POLICH &
PURDY

By: /s/ John Harder
John Harder,
Attorneys for
Defendant
Thomas Elfmont

DATED:
MARCH 11, 1991 STEVENSON &
DePASQUALE

By: /s/ Paul R. DePasquale
Paul R. DePasquale,
Attorneys for Defendant
Charles Wilson

DATED: 3-8-91 MOMMAERTS &
RUTLEDGE

By: /s/ Arthur D. Rutledge
Arthur D. Rutledge
Attorneys for Defendant
Robert L. Clark

DATED: 3/12/92 CHASE, ROTCHFORD,
DRUKKER & BOGUST

By: /s/ John A. Daley by LSK
John A. Daly, Attorneys
for Defendant Carl Sims

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California, 90012.

On **April 15, 1991,** I served the within **OFFER OF JUDGMENT PURSUANT TO FRCP, Rule 68** on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

See Attached List

XX – Federal – I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **April 15, 1991,** at Los Angeles, California.

/s/ Karla Cortez
KARLA CORTEZ